# Supreme Court of the United States

No. 772

BRIEF IN OPPOSITION
TO PETITION FOR WRIT OF CERTIORARI TO
SUPREME COURT OF ILLINOIS

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, A. D. 1960.

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## No. 772

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KENNETH W. PINKSTAFF,

*Petitioner,*

*vs.*

THE PENNSYLVANIA RAILROAD COMPANY,
a corporation,

*Respondent.*

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**ON PETITION FOR WRIT OF CERTIORARI TO SUPREME COURT OF ILLINOIS.**

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**BRIEF OF RESPONDENT IN OPPOSITION.**

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MAY IT PLEASE THE COURT:

### THE OPINIONS BELOW.

The opinions below are correctly cited. As all decisions were unanimous, there were no dissenting opinions filed.

### THE QUESTIONS PRESENTED.

Did the instruction complained of in fact state that evidence of violation of the Safety Appliance Act may be considered as evidence of negligence on the part of the employee?

Did the Supreme Court of Illinois properly rule that plaintiff's contention was factually inapplicable?

May such contention, ignored in both the Trial and the Appellate Court, but raised for the first time in the Supreme Court, be considered by this Court?

Would the refusal to give the instruction complained of have resulted in the denial to this defendant of a "Federal right."?

## STATEMENT OF THE CASE.

Plaintiff's statement of the case grossly misstates the facts, as shown by the record, and as found by the jury, the Trial Court, the Appellate Court, and the Supreme Court.

Plaintiff, having already recovered a judgment of $50,000 in the case, seeks more by asking reversal of the judgment of the three lower courts.

Plaintiff has repeated, now in four courts, his chant that evidence of brake failure was uncontroverted. He specifically has charged that the record showed that the brakes were set in the proper time, but that they failed to operate. Such charge has been rejected in every pleading and brief which we have filed, and by every Court which has considered the case.

Petitioner states that it was uncontradicted that the train should stop within fifty feet or sixty feet after the angle cock was opened, and that plaintiff was three car lengths (or 135 feet) from the embankment when the angle cock was opened. (Petition, p. 3)

But we quote the summary of evidence on his point by the Supreme Court of Illinois: (App. I 3a)

> "There is some conflict in the record as to how far from the embankment the train was when plaintiff went down to set the angle cock, since the conductor

> stated that the lead car was then 'at least two car lengths from the embankment.' Under such circumstances, there would not have been sufficient time for plaintiff to climb down the 15-foot car, set the angle cock, and for the brakes to operate before the train would reach the embankment at the rate of speed it was traveling. . . ."

Plaintiff's witness, Edwards, the conductor and the only eye witness to the occurrence, stated plaintiff was still on top of the train when it was only about 90 feet from the embankment, (A. 144) and that he could not have gotten down in time to stop the train. If so, if Pinkstaff, the plaintiff, had still been on top of the car when only two car lengths, approximately 90 feet, away from the embankment, he would have been unable to "hit the air" in time to stop the train. Plaintiff's own testimony was that the train was traveling about 5 miles per hour (or 7½ feet per second) and that at this speed it would take "from fifty to sixty feet for the train to come to a stop." (A. 106) If he was 90 feet from the embankment when he started down the ladder and he had to allow 60 feet for the brakes to work, he had, at the outside, only four seconds left to reach the angle cock to operate the brakes. (At 5 miles an hour a train would travel 30 feet in about 4 seconds.) An examination of the rear view of the train (Plaintiff's Exhibit 9-B, R. 531, A. 135) shows the impossibility of climbing all the way down the ladder at the back of the car (the cars are 18 feet high), grasping the ladder with one arm, and bending over to operate the angle cock in time to stop the train. (In this instance, 4 seconds) Plaintiff himself allots five car lengths to the time interval (over 30 seconds, at 5 m.p.h. during which he claims that: (1) he realized that no one was receiving his stop signal, and (2) he climbed down the ladder and operated the angle cock.

The evidence on the point is not reviewed in the opinion of the Appellate Court, since petitioner's contentions on this Point were raised for the first time in the Supreme Court.

The Supreme Court of Illinois held, and properly so, that petitioner's main argument here was circular and a logical impossibility.

Succinctly, the Court stated: (App. I, pp. 8a-9a)

> "Plaintiff argues, however, that by the controverted instruction No. 17 the jury were told that defendant's violation of the Federal Safety Appliance Act could be relied upon in mitigation of damages. We cannot perceive how any such interpretation could be drawn. Defendant's violation of the Safety Appliance Act would be in furnishing trains with defective brakes. In the absence of any direct evidence of brake failure in this record, the existence of such defective brakes could be established, as plaintiff points out, by circumstantial evidence. Such evidence, however, would have to show not merely that the train failed to stop when the brakes were set, but that the brakes failed to operate when applied in proper time. No inference of brake failure could be drawn from the failure of the train to stop unless the brakes were applied in time for them to operate. Thus, if plaintiff were contributorily negligent in failing to apply the brakes in time, that would preclude a finding by circumstantial evidence that the brakes were defective, or that defendant violated the act. Consequently, plaintiff's contributory negligence and defendant's violation of the Federal Safety Appliance Act are mutually exclusive; and defendant, in referring to plaintiff's contributory negligence in the instruction, is in no way using its own violation of the act to mitigate damages, as plaintiff contends."

Under the F.E.L.A., neither the Appellate Court nor the Supreme Court could review the evidence to determine the controverted issue of whether the plaintiff applied the angle cock (brake) in time to stop the train. As the Court properly held, if the jury answered the question in the affirmative, there is no evidence of contributory negligence in mitigation of damage under Count I (F.E.L.A.), but there is proof of violation of Count II (Federal Safety Appliance Act); on the other hand, if the jury found that the plaintiff in fact, "failed to operate the air brake in time to stop the train," then there is simultaneously clear proof of contributory negligence under Count I (F.E.L.A.), but no proof, or possibility of proof of violation of Count II (Federal Safety Appliance Act), there being no independent, non-circumstantial evidence of brake defect.

Plaintiff's counsel are not candid with this Court in asserting, contrary to the record and opinions below, that there was uncontradicted evidence of brake failure.

The firm bitterly resents the reiteration in the footnote (p. 9) of certain scandalous charges, and contentions of law which have been carefully reviewed and rejected by all lower courts. (App. I, 11a; App. II, pp. 21a, 30a-33a).

The trial court rejected the charges on the basis of its personal knowledge of the facts, namely, that the informal conference regarding the relevancy of this evidence had taken place while the witness Burge was in town on November 1, 1957, rather than on November 4, 1957, as "testified" to by plaintiff's counsel in his post trial deposition. The trial court well knew that the argument was never as to the amount of the earnings from this alternative source (we offered to stipulate the amount), but rather its relevancy. We raised a preliminary objection as to rele-

vancy, the trial court indicated preliminary agreement with our views, and plaintiff's counsel did not press or renew the point. (App. II, 31a-32a).

Unfortunately, there was no court reporter present at the time, so that plaintiff's counsel felt free, at the post trial hearing, to present his own affidavits, stating the charges recited in the footnote. The trial court, of course, rejected the contentions on personal knowledge of the facts. The Appellate Court and the Supreme Court held: (1) that there was no record to support plaintiff's charges; (2) that the Judge's tentative ruling on the suggested evidence was probably correct (*Salaban* v. *East L. & I. Water Co.*, 284 Ill. App. 358; *Isbitz* v. *Chicago City Ry. Co.*, 192 Ill. App. 487); and (3) that even if the facts stated were true, plaintiff had failed to take certain steps necessary under Illinois law to protect his rights, *i.e.*, to make an offer of proof, or to make secondary proof of the matters, or to move for a continuance or a mistrial. (App. I, 11a; App. II, 30a to 35a).

The claim contained in the final paragraph of the footnote to the effect that three cases relied on by the Appellate Court for the proposition that counsel may not supplement or contradict the record by post-trial affidavit have been overruled by statute, was expressly made by plaintiff below, but rejected by the Supreme Court of Illinois.

## GROUNDS RELIED UPON FOR DISMISSAL OF THE PETITION FOR WRIT OF CERTIORARI.

### I.

**The instruction here complained of has no general applicability. The case is not one of general importance. The instruction will never become a Pattern Jury Instruction.**

We have read with great care plaintiff's Point One. (pp. 11-13) The point proceeds on the unwarranted assumption that every instruction approved by the Supreme Court of Illinois is to become a pattern jury instruction mandatory in all cases where it is factually applicable.

The plaintiff's ingenious argument, of course, is not proved by the mere sending to the Court of the official volume of pattern instructions. Nor is it proved by the correspondence between Mr. Justice Clark of this Court, and Chief Justice Schaefer of the Supreme Court of Illinois, who, it may be observed, concurred in the opinion below.

Nor is petitioner's assumption proved in any other way.

Petitioner entirely misconceives the concept of pattern jury instructions. As the Committee specifically noted (pp. xv) it was not trying to compile a list of all instructions which had ever been approved by the Court, or would be approved by the Court. Further, the Court Rule recommending the use of pattern jury instructions (Rule 25.1) does not constitute a finding by the Court that such instructions correctly state the law. The Rule specifically reserves the power of trial judges and appellate judges to determine the correctness of any pattern instruction.

Indeed, if the Committee had wanted to include this instruction as a pattern jury instruction, it had ample

opportunity. This case has been in the courts for years. It was decided last year by the Supreme Court of Illinois. The Committee's work, on the other hand, was concluded this year, and their official report issued within the last few weeks.

The very uniqueness of the instruction is indicated both by its terms and by the opinion of the Supreme Court below. As shown in the portion quoted in the statement of facts (*supra*, p. 4), the instruction would be inapplicable in any case where there was either uncontradicted or independent evidence of brake failure.

No doubt the best evidence of the uniqueness of the instruction is plaintiff's Point III listed in the Index and argued at p. 16, that the instruction singles out certain particular conduct of the plaintiff as evidence of contributory negligence.

Petitioner cannot simultaneously claim that (1) the instruction is so narrowly related to the evidence of his client's contributory negligence as to be prejudicial (p. 16), and (2) at the same time, so general in its application that if correct, it "should become standard throughout the nation". (p. 14)

The issue in this case is uniquely narrow, and no amount of tortured semantics can convert it into one warranting review on certiorari.

## II.

**The judgment below is correct. All that the Supreme Court of Illinois held was that petitioner's argument, correctly stating the law as it does, was factually inapplicable. All Justices concurred in that opinion.**

The Supreme Court of Illinois carefully considered the argument (pp. 13-15) that the instruction commingles the

two acts and interposes an improper defense to the Safety Appliance Act. It originally considered the argument in connection with its denial of the petition for leave to appeal. Such denial was had only after lengthy briefs were filed by both parties. Thereafter, it allowed plaintiff's motion to reconsider and docketed the case. The question was rebriefed, argued orally, and, again, decided against plaintiff's contentions. Thereafter, the plaintiff filed a petition for rehearing restating his contentions, which were again rejected.

The issue in this case is entirely factual. That plaintiff's counsel misstates the evidence is well shown by the following statement from the Court's opinion (App. I, p. 3a):

> "There is some conflict in the record as to how far from the embankment the train was when plaintiff went down to set the angle cock, since the conductor stated that the lead car was then 'at least two car lengths from the embankment.' Under such circumstances, there would not have been sufficient time for plaintiff to climb down the 15-foot car, set the angle cock, and for the brakes to operate before the train would reach the embankment at the rate of speed it was traveling."

Thus, in approving the instruction, the Court properly held (App. I, pp. 8a-9a):

> "No inference of brake failure could be drawn from the failure of the train to stop unless the brakes were applied in time for them to operate. Thus, if plaintiff were contributorily negligent in failing to apply the brakes in time, that would preclude a finding by circumstantial evidence that the brakes were defective, or that defendant violated the act. Consequently, plaintiff's contributory negligence and defendant's violation of the Federal Safety Appliance

> Act are mutually exclusive; and defendant, in referring to plaintiff's contributory negligence in the instruction, is in no way using its own violation of the act to mitigate damages, as plaintiff contends."

Moreover, at plaintiff's request, the jury was charged that contributory negligence was not a defense under the Safety Appliance Act (A. 8):

> "With reference to the Safety Appliance count, you are instructed that any question of negligence on the part of the defendant or any question of contributory negligence on the part of the plaintiff of the degree of care, if any, used by the defendant in providing, inspecting or keeping in repair said appliances, is entirely immaterial and does not affect the plaintiff's right to recover under this count."

None of the cases cited (pp. 13-15) is remotely relevant. In the *Campbell* case (*Spokane & Inland R.R. Co. v. Campbell*, 241 U.S. 497, 505) the evidence was *uncontradicted* that plaintiff applied the brake 600 feet from the point of impact, whereas experts stated that they should make a stop within 300 feet. The Court's holding was that without more there was circumstantial evidence to uphold a verdict in favor of plaintiff. There did not need to be independent, direct proof of a brake defect. To the same effect see *San Antonio Ry. Co.* v. *Wagner*, 241 U.S. 476, 482, and *Myers* v. *Reading Co.*, 331 U.S. 477, 482, 483 (cited by petitioner).

All that the foregoing cases establish is the right of the petitioner to an instruction that brake defect could be proved circumstantially. But such right was in fact recognized by the Supreme Court of Illinois (App. I, p. 8a):

> "In the absence of any direct evidence of brake failure in this record, the existence of such defective

brakes could be established, as plaintiff points out, by circumstantial evidence. Such evidence, however, would have to show not merely that the train failed to stop when the brakes were set, but that the brakes failed to operate when applied in proper time."

And at plaintiff's request, such an instruction was in fact given (A. 8):

> "With reference to the Federal Safety Appliance Act count, you are instructed that proof of a break or a visible defect in a brake is not a prerequisite to a finding that the statute has been violated. One of the tests of efficiency of a brake is the performance of the appliance."

We invite this Court's attention to its own opinion in *Affolder* v. *N. Y., C. & St. L. R. Co.*, 339 U.S. 96, *reversing* 174 F. 2d 486, under the Safety Appliance Act, wherein the issue of fact was whether certain automatic couplers failed to operate, because they were defective, or because they were never set by plaintiff to operate. The testimony was in direct conflict. In affirming a judgment for the plaintiff this Court stated (p. 99):

> "Further, we said, 'a failure of equipment to perform as required by the Safety Appliance Act is in itself an actionable wrong . . .
>
> Of course this assumes that the coupler was placed in a position to operate on impact. Thus, if 'the failure of these two cars to couple on impact was because the coupler on the Pennsylvania car had not been properly opened,' the railroad had a good defense. • • • The trial court directed the jury at least three times that it was for them to determine the reason why the cars separated and specifically called their attention to the testimony of the head switchman, thus emphasizing the possibility that his failure, if any, to open the coupler was the cause of the separation."

It was not there suggested, nor could it be suggested, that the defendant was trying to plead contributory negligence in defense of a Safety Appliance Act violation.

If the judgment below were reversed, this Court would be overruling its decision in *Affolder*.

Applied to the facts of the present case, the foregoing cases show that petitioner Pinkstaff's testimony that he applied the brakes when he was 90 or 135 feet from the embankment and that the brakes should have operated within 50 or 60 feet, would support a judgment for him under the Safety Appliance Act [Count II]. They show further that if there had been no contradicting testimony a violation of the Safety Appliance Act would have been clearly shown, albeit by circumstantial evidence. But what *Affolder* shows is that proof of a brake defect by circumstantial evidence necessarily assumes that there is direct proof that the device was in fact and in time applied. When evidence is offered, as here, to the effect that the device was not or could not have been applied in time to operate, defendant necessarily has a right to have this theory of defense considered by the jury.

Petitioner's next major contention (pp. 14-15) appears to be that by the simple device of adding, at the end of his case in chief under the F.E.L.A., a second count under the Safety Appliance Act, a plaintiff can deprive a defendant of his right to show contributory negligence under the F.E.L.A., and his right to show a "no violation" defense to the Safety Appliance Act Count. No case cited by plaintiff supports such a position.

Thus, in *Carter* v. *Atlanta & St. A. R.R. Co.*, 338 U.S. 430 (Petition, p. 15), this Court held that in a two count suit, contributory negligence had no place in the count under the Safety Appliance Act, but that in the count

under the F.E.L.A., the defendant had a right to a contributory negligence instruction. (338 U.S. at pp. 436-437).

Plaintiff cites three cases (pp. 15-16) to the effect that contributory negligence in an F.E.L.A. action need not be "specially presented"—whatever that phrase may mean. What the cases hold is that even though defendant need not plead contributory negligence, since the matter relates only to damages, defendant has the "guaranteed Federal right" to an instruction on the point. *Kansas City Ry. Co.* v. *Jones*, 241 U.S. 181, 183; *Pittsburgh C.C. L. R. Co.* v. *Cole*, 260 Fed. 357, 363; *Lee* v. *Louisville & N. R. Co.*, 349 Ill. App. 276, 279-281.

On page 16 of his petition plaintiff raises the new contention that the instruction singles out certain contentions of contributory negligence and tells the jury that such specific matters in fact constitute negligence. The objection is without merit. The Appellate Court disposed of the objection as follows (App. II, 24a-25a):

> "It is further urged that instruction No. 17, based on the amended answer, usurped the province of the jury in that it told them that certain facts constituted negligence. There is no merit to this contention. The instruction is merely defendant's theory of the case and as such embodies the allegations of its answer and not the court's directions. This appears from plaintiff's instruction No. 2 wherein the court explicitly told the jury that 'the complaint filed by the plaintiff in this case and the answer filed by the defendants are the unsworn statements of what the plaintiff and defendant allege, and they neither prove nor tend to prove any allegation contained therein, with relation to this case.' There is evidence in the record from which the jury could have found that the accident resulted from:

1) failure to use a tail hose as required by the rules of the Pennsylvania Railroad;

2) failure to keep a proper lookout; and

3) resultant failure to operate the air brake in time to avoid hitting the embankment."

We note that the latter objection was raised in the Appellate Court, but for some reason ignored by plaintiff in the Supreme Court.

Petitioner's final contention (p. 16) is the novel one, raised here for the first time, that for some reason, in F.E.L.A. actions a defendant is not entitled to have his theory of contributory negligence explained to the jury, but is merely entitled to the stock instruction that if the jury finds the defendant guilty, contributory negligence on the part of plaintiff is not a bar to his recovery, but may be considered in mitigation of damages. In support of such proposition petitioner cites no cases.

Indeed, he can cite none. None exists. *But see Affolder* v. *N.Y., C. & St. L. R. Co.*, 339 U.S. 96, 99, reversing 174 F. 2d 486; *Renaldi* v. *N.Y. N. H. & Hart R. Co.*, 230 F. 2d 841; *Illinois Cent. R. Co.* v. *Nelson*, 203 Fed. 956, 959; *Atchivson, T. S. & F. R. Co.* v. *Hicks*, 208 Okla. 689, 258 P. 2d, 672, 679.

## CONCLUSION.

The contentions here made in some instances for the first time do not merit this Court's consideration.

The issues decided below are uniquely narrow, and were correctly decided. All that the Justices of the Supreme Court of Illinois unanimously held was that petitioner's very meritorious contentions of law were factually inapplicable in this case.

For the foregoing reasons, it is respectfully submitted that this petition for a writ of certiorari should be denied.

Respectfully submitted,

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